Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

AVROM R. VANN; SHIRLEY E. VANN,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED FOR REVIEW

Where (a) after the expiration of the Statute of Limitations the Internal Revenue Service ("IRS") first makes an assessment against a taxpayer, and (b) when the taxpayer refuses to pay the taxes and interest so assessed, the Internal Revenue Service seizes funds on deposit in the taxpayer's bank account for the full amount of the untimely assessment and additional interest thereon, does the taxpayer have any remedy in the Courts or is this yet another instance of abuse by the Internal Revenue Service for which a United States citizen has no remedy?

PARTIES TO THE PROCEEDING

Avrom R. Vann and Shirley E. Vann,

Petitioners,

United States of America, Department of the Treasury, Internal Revenue Service,

Respondents.

There are no publicly owned parent companies or subsidiaries of any of the parties hereto.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Avrom R. Vann and Shirley E. Vann (the "Taxpayers") pray that this Court issue a writ of certiorari to review the Questions Presented and those fairly included therein.

The Courts below, which found the IRS first assessed the Taxpayers after the expiration of the applicable statute of limitations, held that under 28 U.S.C. 1346(a)(1) the Taxpayers, as members of a partnership, have no judicial remedy against this clear abuse by the IRS apparently concluding that the taxpayers cannot recover the monies so illegally removed from their bank account. This request for certiorari follows.

OPINION BELOW

The only opinion below was delivered by the United States District Court for the District of New Jersey is reported except at 1997 U.S. Dist. LEXIS 4695; 97-1 U.S. Tax Cas. (CCH) P50,415; 79 A.F.T.R.2d (P-H) 2052 and is located at Appendix Page A1. The Judgment Order of the United States Court of Appeals for the Third Circuit is unreported except at 1997 U.S. App. LEXIS 38528 and is located at Appendix Page A7.

JURISDICTION OF THE DISTRICT COURT

The Judgment of the United States Court of Appeals for the Third Circuit was entered on December 18, 1997. Jurisdiction to review this petition by writ of certiorari is

conferred upon the Court by 28 U.S.C. 1254(1). The District Court had jurisdiction over the claims in the first instance under the provisions of 28 U.S.C. 1331, 1340, 1346 and Internal Revenue Code Section 7402(e). The text of each of these statutes is set out verbatim in the appendix hereto.

JURISDICTION OF THE COURT OF APPEALS

Jurisdiction in the Court of Appeals existed under 28 U.S.C. Section 1291 on the grounds that the appeal to the Court of Appeals was from a final Order of the United States District Court for the District of New Jersey. The Taxpayers served and filed their Notice of Appeal to the Court of Appeals for the Third Circuit on April 2, 1997 from an Order filed March 27, 1997 in the District Court which granted Summary Judgment to the Respondents herein dismissing the Taxpayers' Complaint and which denied the Cross-Motion of the Taxpayers for Summary Judgment.

Subject matter jurisdiction exists pursuant to 28 U.S.C. Section 1346(a)(1).

STATEMENT OF THE CASE

Petitioner, Avrom R. Vann was a partner in Kent Associates II ("Kent") which was a further partner in The Securities Group 1980 which in turn was a further partner in The Securities Group ("Securities Group"). The Taxpayers and the United States of America agree that the

applicable Statute of Limitations is determined under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").

Under Internal Revenue Code ("IRC") Section 6229(d) the TEFRA Statute of Limitations against a partner of a partnership for a partnership item expires three years from the later of (i) the due date for filing of the partnership return or (ii) the date on which the partnership return was filed. The partnership item adjustments are then applied to the partners' returns by means of a computational adjustment made at the conclusion of the partnership proceeding. However, where, as in the present case, the IRS issues an FPAA within the time limitation set forth in IRC Section 6229(a), the time allowed to the IRS to make a computational adjustment is extended to one year after the FPAA adjustments become final.

On October 15, 1987 the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") to the Securities Group for its 1983 Tax Year. The IRS disallowed interest expenses claimed by the Securities Group as a deduction and the IRS accordingly adjusted the 1983 income of Securities Group. No Petition for readjustment was filed with respect to the FPAA. Accordingly, the one year period available to the IRS to assess the partners of Securities Group (which included partners of Kent) expired on March 13, 1989, which is one year after the FPAA became final.

The District Court, which found the assessment was first made after the expiration of the TEFRA statute of limitations, held that notwithstanding the fact that assessment was made after the statute of limitation expired,

because the assessment arose from the disallowance of a deduction taken by a partnership in which the Taxpayers had been a partner, under 26 U.S.C. 7422(h) the Taxpayers are precluded from maintaining an action against the United States of America. The Court below, which made no distinction between an assessment made within the applicable TEFRA statute of limitations and an assessment only made after the expiration of the TEFRA statute of limitations, appeared to consider 28 U.S.C. 1346(a)(1) unavailable to the Taxpayers.

The Court of Appeals for the Third Circuit affirmed by a Judgment Order without furnishing any explanation or rationale for its affirmance. This Court has never before interpreted the interplay of these three statutory provisions. The Courts below have rendered meaningless the TEFRA Statute of Limitations since the IRS is now free to assess a partner at any time, even after the expiration of the Statute of Limitations, and to levy upon the assets and properties of the Taxpayers, without being subject to judicial review, which certainly is not the intent of TEFRA nor the intent of Congress and is unconscionable.

The Taxpayers and the government both agreed that where the assessment is timely made by the IRS, under the governing statute the partnership and not the individual partner must proceed in Court. Of course, the statute does not contemplate and therefore does not specify what occurs where the IRS, after the expiration of the governing statute of limitations, first makes an assessment against an individual partner. Does the taxpayer then have a right to challenge the IRS in court, given the fact that the partnership no longer has any interest or

standing to act? The issue presented to the Courts below and this Court are:

What rights to judicial review does a taxpayer have where the IRS first makes an assessment *after* the TEFRA statute of limitations expires?

Is an assessment made after the expiration of the statute of limitations an assessment on which the IRS may levy?

Is an assessment first made after the expiration of the statute of limitations an assessment based upon a partnership item as contemplated by TEFRA?

If after the expiration of the statute of limitations the IRS can assess and levy and the taxpayer has no redress, what purpose does the statute of limitations serve?

Assuming that 28 U.S.C. 7422(h) supersedes the provisions of 28 U.S.C. Section 1346(a), does that continue to be the case after the expiration of the TEFRA statute of limitations?

Is an assessment and collection of income taxes made after the expiration of the TEFRA Statute of Limitations an erroneously or illegally assessed or collected tax wrongfully collected under the internal-revenue laws to invoke judicial intervention under 28 U.S.C. 1346(a)?

ARGUMENT

Denying judicial review to Taxpayers whose bank accounts were seized by the IRS without any prior judicial proceedings or authorization, solely based upon an

income tax assessment which the District Court found was made only after the expiration of the applicable Statute of Limitations departs from the accepted and usual course of judicial proceedings to warrant the exercise by this Court of its supervisory power. The construction to be given to the interplay of (i) the TEFRA Statute of Limitations, (ii) 26 U.S.C. 7422(h) which limits the rights of an individual partner to commence a lawsuit to determine a partnership deduction, and (iii) 28 U.S.C. 1346(a)(1) which provides a judicial remedy for a taxpayer to recover illegally collected taxes, raises an important question of federal law which has not been, but should be, settled by this Court.

Both the District Court and the Court of Appeals incorrectly applied 26 U.S.C. 7422(h), which governs assessments timely made by the IRS before the expiration of the TEFRA Statute of Limitations, to preclude judicial review where the IRS first made an assessment after the expiration of the TEFRA Statute of Limitations, which could not have been the statutory intent nor the intent of Congress. Such a statutory construction renders meaningless the TEFRA Statute of Limitations.

After receiving notice of the assessment, the Taxpayers advised the IRS that the assessment was made after the expiration of the Statute of Limitations and requested the IRS to furnish authority for its claimed right to enforce collection of the assessment. The IRS did not furnish any basis to the Taxpayers for its alleged right to make the assessment after the Statute of Limitations expired. Instead the IRS simply proceeded to twice levy upon a bank account of the Taxpayers and to collect the full amount of the wrongfully assessed income taxes and

the interest which the IRS calculated to be due and owing.

The District Court expressly found that the Taxpayers timely made application for a refund which was denied by the IRS and that the Taxpayers timely commenced their action in the District Court to recover the taxes and interest so collected by the IRS. The District Court further found that the TEFRA Statute of Limitations expired on March 13, 1989, one year after the FPAA became final. The District Court expressly refused to consider the contention of the Respondents that a six year statute was applicable finding that Respondents failed to comply with the Court's Discovery timetables. However, because the assessment has its origins in the denial of deductions taken by the Securities Group, the District Court concluded it was powerless to exercise jurisdiction by virtue of 26 U.S.C. 7422(h). In this holding both the District Court and the Court of Appeals were in error, so much so that exercise of the supervisory powers of this Court are appropriately exercised.

The Taxpayers did not commence their action to challenge any computation made by the IRS concerning Securities Group. In fact, the Taxpayers did not dispute the fact that they lacked standing to maintain any such action. The Taxpayers did commence their action to recover income taxes and interest assessed after the expiration of the Statute of Limitations and illegally collected under internal-revenue laws. Jurisdiction to maintain such a suit exists under 28 U.S.C. 1346(a). The District Court never considered this express statute, erroneously applying 26 U.S.C. 7422(h) to the facts.

Under the District's Court construction of 26 U.S.C. 7422(h), Congress enacted a TEFRA Statute of Limitations specifically establishing a time limitation in which the IRS may assess a taxpayer who is a member of a partnership for income taxes owing by virtue of the taxpayers' participation in such partnership but also enacted a separate statute which says that if the IRS assesses an individual partner after the expiration of the TEFRA Statute of Limitations and collects the taxes assessed, the taxpayer has no remedy in any forum. Such a statutory construction is absurd, defies logic and experience, renders meaningless the TEFRA Statute of Limitations and is incongruous with the construction which is mandated by the three separate governing statutory provisions, namely, (i) the TEFRA Statute of Limitations, (ii) 26 U.S.C. 7422(h) which limits the rights of an individual partner to commence a lawsuit to determine a partnership deduction, and (iii) 28 U.S.C. 1346(a)(1) which provides a judicial remedy for a taxpayer to recover illegally collected taxes. The only construction which gives effect to each of the three separate statutory provisions is simply that if an assessment is made against a partner prior to the expiration of the TEFRA Statute of Limitations, then under 26 U.S.C. 7422(h) only the partnership and not the partner may proceed in Court. However, if an assessment is first made against a partner after the expiration of the TEFRA Statute of Limitations, then 26 U.S.C. 7422(h) is inapplicable and the individual partner may proceed under 28 U.S.C. 1346(a)(1) to recover taxes illegally collected. This latter construction, which gives effect to each of these three separate statutory provisions depending upon whether an assessment is made before or after the expiration of

the TEFRA Statute of Limitations, does not render any of these three statutes meaningless but rather gives effect to each section in the appropriate set of circumstances.

Equally ironic is the result mandated by the Courts below that a Taxpayer may enjoin collection of an assessment before seizure by the IRS where the taxpayer can establish facts to support equity jurisdiction and can show that the government cannot prevail on the merits *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 1129, 8 L. Ed. 2d 292 (1962) or where Congress has provided no alternate means of challenging the validity of a tax, *South Carolina v. Regan*, 465 U.S. 367, 378-79, 79 L. Ed. 2d 372, 104 S. Ct. 1107, 1114-15 (1984) and yet the Taxpayers cannot have access to the Courts after the IRS wrongfully assesses and actually illegally collects the taxes and interest. This absurd result is the law as expounded by the District Court and affirmed by the Court of Appeals. Of course, were it any agency of the United States other than the IRS, the levy could not have been made absent a prior judicial hearing and determination as any other agency would have had to institute legal proceedings to obtain a judgment against the claimed obligor before any levy could have been made, thereby affording the alleged obligor (equivalent to the Taxpayer in the instant case) the opportunity for advance judicial review.

The District Court concluded that an untimely assessment retains its partnership item status under 26 U.S.C. 7422(h) even after the expiration of the TEFRA Statute of Limitations. The District Court could cite no authority for this remarkable conclusion and in fact no such authority exists. As the District Court observed the Statute was

intended to promote judicial economy and consistency of results; yet its own interpretation defies this very standard since it defies any consistency in the application of the TEFRA Statute of Limitations, which specifically sets the outside date by which the IRS may act to assess an individual member of a partnership with respect to a partnership item.

CONCLUSION

This documented abuse by the IRS and denial of redress in the Courts by virtue of a gross misapplication of the controlling statutes, clearly warrants review by this Court to settle this important question of statutory construction of the three separate provisions in a manner which gives full meaning to each section and does not render any of the three sections meaningless. If the present holding of this case is not reviewed and reversed by this Court, the Federal Court system has determined that it is powerless in the face of the IRS utterly disregarding its statutory limitations.

Petitioners respectfully request that this petition be granted and that a writ of certiorari be issued.

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APPENDIX

Text of District Court Opinion

AVROM R. VANN and SHIRLEY E. VANN, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.

Civ. No. 96-132 (DRD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

March 27, 1997, Decided
March 27, 1997, ORIGINAL FILED

NOTICE: NOT FOR PUBLICATION

DISPOSITION: Defendants' motion for summary judgment granted, and plaintiffs' cross-motion for summary judgment denied.

COUNSEL: Appearances:

Avrom R. Vann, Esq., Fairlawn, New Jersey, Attorney for Plaintiffs.
Faith S. Hochberg, United States Attorney by Susan C. Cassell, Esq., Assistant U.S Attorney, United States Attorney, District of New Jersey, Newark, New Jersey. Of Counsel: Lawrence P. Blaskopf, Esq., Trial Attorney, Tax Division, U.S. Department of Justice, Washington, D.C., Attorneys for Defendants.

JUDGES: Dickinson R. Debevoise, U.S.S.D.J.

Plaintiffs instituted this action against defendants to recover an income tax refund for the 1983 tax year. Plaintiffs seek a refund of $ 36,103.56 plus interest. This sum represents the amount the Internal Revenue Service appropriated in 1991 through two levies on plaintiffs' bank accounts, and applied to a tax assessment against

plaintiffs for the 1983 tax year. Defendants move for, and plaintiffs cross move for, summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, defendants' motion is granted, and plaintiffs' cross-motion is denied.

BACKGROUND

Plaintiffs, Avrom R. Vann and Shirley E. Vann, filed their amended joint income tax return for the year 1983 ("the 1983 Tax Return") on December 9, 1985. Plaintiffs' income shown on the 1983 Tax Return reflected partnership losses attributable to Avrom R. Vann's ownership of a partnership interest in Kent Associates II. Kent Associates II was a partner of a larger partnership known as Securities Group 1980. Securities Group 1980, in turn, was a partner of a partnership known as The Securities Group.

On October 15, 1987, the Internal Revenue Service (I.R.S.) issued a Notice of Final Partnership Administrative Adjustment (FPAA) to The Securities Group for its 1983 tax year. The I.R.S. determined that interest expenses claimed by The Securities Group should be disallowed as a deduction, and it adjusted the partnership's income accordingly.[1]

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[1] It should be noted that because of defendants' failure to comply with Magistrate Chesler's Discovery timetable, the fraud evidence recently submitted by defendant, (i.e. the indictment of Charles Atkins, the general partner of The Securities Group and Securities Group 1980, and the Amended Judgment and Probation/Commitment Order concerning Charles Atkins), will not be considered by the court.

The I.R.S. notified plaintiffs by letter dated August 22, 1990 that it planned to assess plaintiffs with respect to the 1983 Tax Return for their ownership interest in Kent Associates II. The I.R.S. determined that plaintiff's share of Kent Associates II's income was greater than what they reported on their 1983 income tax return. Specifically, plaintiffs reported in their amended income tax return that their share of income from Kent Associates II was $ 12,546.00 in 1983. The I.R.S. subsequently determined that plaintiffs' share of income from Kent Associates II in 1983 was $ 52,481.00. Accordingly, the I.R.S. advised plaintiffs that they owed $ 17,568.00 of additional tax.

Shortly after receiving the letter dated August 22, 1990, plaintiff Avrom R. Vann contacted an I.R.S. representative by telephone, and later by letter, to inquire as to the bases for the proposed assessment. Plaintiff Avrom R. Vann requested copies of all documents upon which the I.R.S. was relying in claiming that it could interpose the assessment. The I.R.S. did not produce any such documentation.

On September 17, 1990, the I.R.S. actually assessed plaintiffs with the $ 17,568.00 of additional tax. Plaintiffs refused to pay this amount on the grounds that the assessment was untimely and improper. On July 10, 1991, the I.R.S. proceeded to levy upon plaintiffs' bank account at the Saving Bank of Rockland and withdrew $ 35,674.53. On December 21, 1991, the I.R.S. withdrew a further sum of $ 429.03 for a total of $ 36,103.56. This amount constituted the principal amount of the assessment and the interest and penalties imposed by the I.R.S. through the date of the second levy.

On May 25, 1993, plaintiffs filed a claim for a tax refund for the 1983 Tax Year with the I.R.S. On March 25, 1994, the I.R.S. denied the claim.

STANDARD OF REVIEW

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), rev'g, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96, 99 (3d Cir. 1974), cert. denied, 429 U.S. 860, 50 L. Ed. 2d 137, 97 S. Ct. 161 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The mere existence of some alleged factual dispute

between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. Id. at 247-248.

ANALYSIS

The first issue presented is whether the court has subject matter jurisdiction over this action. As a general rule, district courts have jurisdiction over refund claims. 28 U.S.C. Section 1346(a)(1).[2] To bring an income tax refund suit in a district court, two basic requisites must be met. First, the taxpayer must pay the assessed tax. See Flora v. United States, 362 U.S. 145, 4 L. Ed. 2d 623, 80 S. Ct. 630 (1960); Koss v. United States, 69 F.3d 705, 707 (3d Cir. 1995). Second, the taxpayer must file an administrative claim for refund or credit with the I.R.S. 26 U.S.C. Section 7422.[3] In the instant case, plaintiffs have clearly satisfied both of these requirements. Plaintiffs paid the

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[2] Section 1346(a)(1) accords the district court original jurisdiction over any "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . " 28 U.S.C. Section 1436(a)(1).

[3] Section 7422(a) provides:

> No suit prior to filing claim for refund. – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

assessed tax via the two levies placed on their bank accounts at the Saving Bank of Rockland. Moreover, plaintiffs filed an administrative claim for refund or credit with the I.R.S. on May 25, 1993. Plaintiffs' Exhibit 6.

In advancing its argument that the court lacks subject-matter jurisdiction, however, defendants rely on the jurisdictional limitation delineated in 26 U.S.C. Section 7422(h). Section 7422 provides that "no action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c)." Hence, the critical inquiry for purposes of resolving the subject-matter jurisdiction issue is whether the instant refund action is attributable to partnership or nonpartnership items. As the Fifth Circuit Court of Appeals explained in Alexander v. United States, 44 F.3d 328 (5th Cir. 1995):

> If the refund is attributable to partnership items, section 7422(h) applies and deprives the court of jurisdiction. If, on the other hand, the refund is attributable to nonpartnership items, then section 7422(h) is irrelevant, and the general grant of jurisdiction is effective.

Id. at 331; see also Koss, 69 F.3d at 707 (holding that other statutory provisions placing requirements or restrictions on refund actions limit and determine the scope of the section 1346 grant of jurisdiction).

Section 6231(a)(3) defines partnership items as "any item required to be taken into account for the partnership's taxable year . . . to the extent regulations . . . provide that . . . such item is more appropriately determined at the partnership level than at the partner

level." 26 U.S.C. Section 6231(a)(3). More specifically, the Treasury Regulations define partnership items as "items of income, gain, loss, deduction or credit of the partnership." Treas. Reg. Section 301.6231(a)(3)-1(a)(1)(i); see also Bob Hamric Chevrolet, Inc. v. USA, Internal Revenue Service, 849 F. Supp. 500, 510 (W.D. Tex. 1994).

In the instant case, plaintiffs are seeking a refund of taxes the I.R.S. assessed and collected as a result of Mr. Vann's participation in the Kent Associates II partnership. The I.R.S. assessed additional tax against plaintiffs because it determined that Kent Associates II had income in addition to what it reported for the 1983 tax year. This additional income stemmed from disallowance of interest expense deductions claimed by The Securities Group, a partnership in which Mr. Vann was a third tier partner.[4] Plaintiffs' refund action is therefore clearly attributable to a "partnership item", namely deductions of a partnership, within the meaning of 26 U.S.C. Section 6231(a)(3).

Notwithstanding section 7422(h)'s general prohibition against the institution of refund actions attributable to partnership items, there are two limited exceptions to this rule. 26 U.S.C. Section 7422(h). First, section 6228(b) permits refund actions where a partner files a request for an administrative adjustment pursuant to section 6227(c). See 26 U.S.C. Section 6227-8, 7422. Section 6227(a) requires that such requests be filed within three years of the filing of the partnership return. In this case, plaintiffs

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[4] Mr. Vann was a partner of Kent Associates II, which was a partner of the Securities Group 1980 partnership, which was a partner of The Securities Groups, the partnership that claimed the interest expense.

failed to file a request for administrative adjustment within three years of the filing of Kent Associates II's tax return. Hence, their refund action is not permitted by 26 U.S.C. Section 6228(b).

The second exception to the general rule that partners cannot bring refund actions attributable to partnership items is 26 U.S.C. 6230(c). Section 6230(c)(1) authorizes refund claims on the grounds that:

> (A) the Secretary erroneously computed any computational adjustment necessary – (i) to make the partnership items on the partner's return consistent with the treatment of the partnership items on the partnership return, or (ii) to apply to the partner a settlement, a final partnership administrative adjustment, or the decision of a court in an action brought under section 6226 or section 6228(a),
>
> (B) the Secretary failed to allow a credit or to make a refund to the partner in the amount of the overpayment attributable to the application to the partner of a settlement, a final partnership administrative adjustment, or the decision of a court in an action brought under section 6226 or section 6228(a).

26 U.S.C. Section 6230.

In the case at bar, plaintiffs do not aver that their suit concerns either of the grounds set forth in section 6230(c). As Mr. Vann himself conceded at his deposition, the only basis for bringing the instant refund action is that the additional assessment of tax by the I.R.S. was allegedly barred by the statute of limitations. See Deposition of Avrom R. Vann at page 35, lines 11-17. Hence, plaintiffs

do not satisfy the second exception to section 7422 for bringing an income tax refund action. 26 U.S.C. Section 7422.

In short, plaintiffs maintain that they are entitled to a tax refund on the basis that the I.R.S.'s assessment of additional tax attributable to their participation in Kent Associates II was untimely and therefore invalid. Such an action does not fall within the grounds for refund actions permitted by 26 U.S.C. 7422(h). Cf., Kuralt v. United States, 866 F. Supp. 727 (S.D.N.Y.), aff'd 40 F.3d 25 (2d Cir. 1994). The statute was intended to promote judicial economy and consistency of results, and to facilitate comprehensive settlements, by enabling the courts and the I.R.S. to address issues affecting the entire partnership in a single forum. Beard v. United States, 992 F.2d 1516, 1519 (11th Cir. 1993) (citing H.R.Conf.Rep. No. 97-760, 97th Cong., 2d Sess. 599 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1190, 1371). Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' cross-motion for summary judgment is denied. I shall file an appropriate order implementing this opinion.

Dickinson R. Debevoise, U.S.S.D.J.

Dated: March 27, 1997

District Court Order

This matter having been opened to the Court by Faith S. Hochberg, United States Attorney for the District of New Jersey, Susan C. Cassell, Assistant United States Attorney, and Lawrence P. Blaskopf, Trial Attorney for the Tax Division, attorneys for the defendants, on a motion for summary judgment, and by Avrom R. Vann, Esq., attorney for the plaintiffs, on a cross motion for summary judgment, notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 27th day of March 1997,

ORDERED as follows:

1. Defendants' motion for summary judgment is GRANTED, and the Complaint is dismissed with prejudice.

2. Plaintiffs' cross-motion for summary judgment is DENIED.

Dickinson R. Debevoise, U.S.S.D.J.

JUDGMENT ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

AVROM R. VANN; SHIRLEY E. VANN, Appellants v. UNITED STATES OF AMERICA; DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE

No. 97-5175

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 11, 1997, Submitted under Third Circuit LAR 34.1(a)
December 18, 1997, Decided

PRIOR HISTORY: On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action No. 96-cv-00132). (District Judge: Hon. Dickinson R. Debevoise).

JUDGES: Before: GREENBERG, ROTH, and SEITZ, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants,

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered March 27, 1997, be and is hereby affirmed.

Text of the Statutes involved

26 U.S.C. Section 6229(d)

(d) Suspension when secretary makes administrative adjustment. If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended –

(1) for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

26 U.S.C. Section 7422(h)

(h) Special rule for actions with respect to partnership items. No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

28 U.S.C. Section 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

28 U.S.C. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1346(a)

The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.